STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 24, 2006
v	No. 262366 Grand Traverse Circuit Court
DOYLE THOMAS PIERMAN, Defendant-Appellant.	LC No. 04-009568-FH

Before: Whitbeck, C.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of one count of producing child sexually abusive material, MCL 750.145c(2). Defendant's conviction arises out of the taking of sexually explicit photographs of his daughter. Defendant was sentenced to serve a prison term of 35 months to 20 years. We affirm.

Defendant first argues that he was deprived of the effective assistance of counsel when counsel failed to move to suppress his confession on the basis that it was the product of misrepresentations and offers of leniency by the interrogating officer. Because "no *Ginther*[1] hearing has been conducted, our review of the defendant's claim of ineffective assistance of counsel is limited to mistakes that are apparent on the record." *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). Because this issue turns on the propriety of the admission of defendant's confession, we consider the admissibility of that confession.

A confession must be voluntary in order to be admitted into evidence. *Dickerson v United States*, 530 US 428, 433; 120 S Ct 2326; 147 L Ed 2d 405 (2000). In *People v Conte*, 421 Mich 704; 365 NW2d 648 (1984), a majority of our Supreme Court concluded that, in order to determine whether a confession that was allegedly induced by promises of leniency was voluntarily made, the reviewing court must consider the totality of the circumstances. *Id.* at 750-751, 753 (Boyle, J., joined by Ryan, J.), 761 (Brickley, J.), 761-762 (Cavanagh, J.). This, Justice Boyle explained,

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

> . . . requires consideration of a multiplicity of factors, including, but not limited to, the nature of the inducement, the length and conditions of detention, the physical and mental state of the defendant (including his age, mentality, and prior criminal experience), the conduct of the police, and the adequacy and frequency of advice of rights.
>
> If, after considering all relevant factors, the court concludes that the inducements offered did not overcome the defendant's ability to make a voluntary decision to make a statement, the statement(s) will be admissible. In all such cases, the burden is on the people to demonstrate voluntariness by a preponderance of the evidence. [*Id.* at 754-755 (Boyle, J.) (citations omitted).]

An interrogating officer's misrepresentations will not per se render a confession inadmissible; instead, the misrepresentations are to be considered under the totality of the circumstances. *United States v Byram*, 145 F3d 405, 408 (CA 1, 1998); *People v Shipley*, 256 Mich App 367, 373; 662 NW2d 856 (2003) (citation omitted).

The evidence defendant proffers on appeal is insufficient to establish that his confession was involuntary under the totality of the circumstances. The interrogating officer testified, and defendant does not dispute, that he was advised of his rights under *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Defendant agreed to speak with the officer notwithstanding. Defendant was interrogated for a total of two and a half hours, *United States v Cichon*, 48 F3d 269, 271, 276 (CA 7, 1995) (finding confession voluntary upon two hour interrogation), overruled on other grounds by *United States v Baldwin*, 60 F3d 363 (CA 7, 1995), and was afforded a break midway through the interrogation, *McCalvin v Yukins*, 444 F3d 713, 720 (CA 6, 2006). Though he had no prior criminal experience, defendant was 50 years old at the time he was interrogated, had graduated high school, and was employed as a mechanic. *Id.* (finding confession voluntary in part where the defendant was over the age of majority and a high school graduate). Defendant has not alleged he was the subject of threats, intimidations, or physical abuse, and there is nothing in the record suggesting defendant was under the influence of a controlled substance.

Defendant argues that his confession was involuntary because the interrogating officer misrepresented to defendant that he was free to leave. Assuming that he was mislead on this point, such a misrepresentation does not render defendant's confession inadmissible. *Holland v McGinnis*, 963 F2d 1044, 1051 (CA 7, 1992). Indeed, rather than contribute to defendant's perception that he was operating under compulsion, any belief that he was free to leave rendered his statement all the more voluntary. *United States v Crawford*, 372 F3d 1048, 1061 (CA 9, 2004) (finding confession voluntary where the defendant is told "that he was not under arrest and was free to leave").

Defendant further argues that his confession was involuntary because the interrogating officer promised him leniency to induce his confession. Defendant points to the officer's statements "offer[ing] some form of assistance," to "help" defendant should he tell the truth, and to "allow" defendant "some reprieve" in exchange for his honesty. However, the officer's "vague description of the potential benefits of cooperation contained no material misrepresentations or unfulfillable promises." *United States v Gaines*, 295 F3d 293, 299 (CA 2, 2002). Moreover, "'there is no inconsistency between the required warning that the defendant's

statement may be used against him and a further statement that cooperation can help him. Both are true.'" *Id.* (citation omitted); see also *Simmons v Bowersox*, 235 F3d 1124, 1133 (CA 8, 2001) (observing that the statement "that telling the truth 'would be better for him' does not constitute an implied or express promise of leniency"). Here the interrogating officer's statements amount to nothing more than admonitions to be honest, coupled with vague suggestions that positive repercussions might follow. They do not warrant a finding that defendant's confession was involuntary. This is especially so where, as here, the totality of the circumstances otherwise indicates defendant's confession was voluntary. *Gaines, supra* at 299. Indeed, the record suggests that defendant's confession was most likely induced by the officer's production of the photographs depicting the victim. Cf. *Holland, supra* at 1051.

Therefore, because defendant's confession was voluntary, defendant's claim of ineffective assistance for failure to file a motion to suppress is without merit. "Defense counsel is not required to make a meritless motion or a futile objection." *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Defendant also argues his confession should not have been admitted because the corpus delicti of the offense had not been properly established. We disagree. To preserve a corpus delicti challenge for review, the issue must be raised before the trial court. See *People v Ish*, 252 Mich App 115, 116; 652 NW2d 257 (2002). Defendant failed to challenge the admission of his confession based upon the corpus delicti rule. Accordingly, our review is for plain error. *Id.*

"The corpus delicti rule requires that a preponderance of direct or circumstantial evidence, independent of a defendant's inculpatory statements, establish the occurrence of a specific injury and criminal agency as the source of the injury before such statements may be admitted as evidence." *People v Burns*, 250 Mich App 436, 438; 647 NW2d 515 (2002). "The purpose of the corpus delicti rule is to prevent the use of a defendant's confession to convict him of a crime that did not occur." *Ish, supra* at 116. "'Proof of the identity of the perpetrator of the act or crime is not a part of the corpus delicti.' It is sufficient to show that the crime was committed by *someone*." *People v Konrad*, 449 Mich 263, 270; 536 NW2d 517 (1995) (citation omitted).

The corpus delicti of child sexually abusive activity in the context of this case requires that a preponderance of the evidence establish either (1) that a child under 18 years of age engaged in sexually abusive activity to produce sexually abusive material, and that an individual caused or knowingly allowed the child to so act for purposes of producing the sexually abusive material, or (2) that someone arranged for, produced, made or financed child sexually abusive activity or material. MCL 750.145c(1)(b), (g)-(h), (*l*)-(m), (2). The existence of a photograph that clearly depicts a child engaged in child sexually abusive activity will usually suffice to satisfy the corpus delicti of this offense under either prong. However, in this case, defendant argues that the corpus delicti was not satisfied because there was no independent evidence that the photographs were of a person under 18 years old. We disagree.

The record does not contain sufficient evidence concerning the photographs to conclude that the photographs themselves were sufficient to establish by a preponderance of the evidence that the person in the photographs was under the age of 18. However, although the victim's stepmother could not conclusively identify the individual depicted or that person's age, she testified about identifying information found in the photographs suggesting they were of

defendant's daughter. Specifically, she testified that the pictures were taken in defendant's home in what appeared to be the victim's bed and the family stairwell, that the family dog was included in the photos, and testified about certain physical characteristics of the person in the photos, which appeared to match defendant's daughter. Moreover, defendant's wife testified that the photographs were likely taken when the victim was 13 (the victim was 16 at the time of the trial). Therefore, there was sufficient evidence to establish by a preponderance that the pictures were of defendant's daughter who was a child under the age of 18 at the time. See *Burns, supra* at 438.

We also reject defendant's contention that the corpus delicti was not established because independent evidence did not demonstrate that the photographs were the product of criminal agency. Because the statute criminalizes the production of child sexually abusive material or inducing or knowingly permitting a child to engage in child sexually abusive activity for the purpose of making child sexually abusive material, the existence of the photographs depicting a child engaged in child sexually abusive activity necessarily establishes that someone produced child sexually abusive material.[2] Consequently, once there was sufficient evidence to establish by a preponderance that the person depicted in the photographs was under the age of eighteen, the mere existence of the photographs in question satisfied the criminal agency aspect of the corpus delicti for this offense. *Id.*

In addition, we reject defendant's claim that his trial counsel was ineffective for failing to challenge the admission of his confession based on the corpus delicti rule. Because there was sufficient evidence to establish the corpus delicti of the charged offense, defendant's trial counsel cannot be faulted for not objecting to the admission of defendant's confession on that basis. *Goodin, supra* at 433. Defendant also challenges the sufficiency of the evidence on the ground that, absent his confession, the remaining evidence was insufficient to support his conviction. This argument is rendered meritless by our conclusion that defendant's confession was properly admitted.

Finally, defendant argues that the trial court erred in failing to strike information from the presentence investigation report (PSIR) concerning allegations that he had sexually penetrated his daughter. At sentencing, defendant argued that the PSIR inaccurately reflected that he had sexually penetrated his daughter because she recanted the earlier statements in a letter to the court. Defendant proposed qualifying the statements concerning penetration by reference to the recantation. At this request, the court attached the letter to the PSIR and added language indicating the child now recants the allegations.

The court then sentenced defendant. In doing so, it stated:

> There is also good evidence of other additional numerous incidents of sexual contacts with the . . . [child]; and, I'm specifically not sentencing him

[2] Furthermore, contrary to defendant's contention, the fact that a child could theoretically take his or her own picture does not defeat the criminal agency prong of the corpus delicti rule. MCL 750.145c(2) criminalizes the production of child sexually abusive material by *any* person.

> [defendant] based on penetrations because . . . [the child] denies that, and I'm uncomfortable finding that those happened for purposes of sentencing. And, so, we'll leave it at that.

Defendant now challenges the court's inclusion of information in the PSIR concerning alleged sexual penetrations. Defendant argues that he has not forfeited this claim of error because it was only after the court agreed to include the child's recantation in the PSIR that the court indicated that it would not rely on the challenged information relating to penetration. However, defendant did not raise a new objection to the inclusion of the challenged information in the PSIR after the court had indicated its decision not to rely on it. Thus, this claim of error was not properly preserved and will be reviewed for plain error. *People v McLaughlin*, 258 Mich App 635, 669-671; 672 NW2d 860 (2003). Because defendant failed to demonstrate that he has been prejudiced by the inclusion of the information in the PSIR, he is not entitled to relief under the plain error rule. *People v McNally*, 470 Mich 1, 5; 679 NW2d 301 (2004).[3]

Affirmed.

/s/ William C. Whitbeck
/s/ William B. Murphy
/s/ Michael R. Smolenski

[3] We also reject that counsel's handling of the PSIR matter evidenced ineffective assistance. Defendant has abandoned this argument by failing to properly brief it on appeal. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).